COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 048618-01**

Halit Bajrami	Employee
Perini Kiewit Cashman	Employer
National Union Fire Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, McCarthy and Costigan)

APPEARANCES
John A. Pulgini, Esq., for the employee at hearing
Elaine Pulgini, Esq., for the employee on brief
Shawn E. Mullen, Esq., for the insurer

CARROLL, J. Both parties appeal an administrative judge's decision awarding the employee temporary partial incapacity benefits. We summarily affirm the decision as to the application of the "prevailing wage." See McCarty v. Wilkinson, 11 Mass. Workers' Comp. Rep. 285 (1997), direct appellate review granted, January 6, 2005, SJC-14497. We address three other issues raised by the parties.

The employee, age forty-four at the time of hearing, is a native of Albania with a twelfth grade education there. He immigrated to the United States in 1997, and is now a U.S. citizen. After doing odd jobs such as working at a gas station and washing dishes, he became a union laborer. At the time of his injury, he had worked as a welder on the Central Artery "Big Dig" project for eleven months. His job involved lifting iron and steel forms weighing up to 175 pounds. (Dec. 651.)

While using an acetylene torch at work on December 26, 2001, the employee passed out from the fumes and fell twenty feet, suffering burns, as well as injuries to his elbow, head and back. He was hospitalized for seven days and

spent another seven days at Spaulding Rehabilitation Center. (Dec. 651.) He continues to suffer from significant pain, including numbness in his back and pins and needles in his legs. In addition, he has difficulty sitting, standing, kneeling, bending and squatting. (Dec. 652.)

The insurer paid § 34 temporary total incapacity benefits on a without prejudice basis from December 28, 2001 through May 21, 2002, when it unilaterally reduced the employee's benefits. The employee filed a claim for reinstatement of § 34 payments. In addition, the employee claimed an increase in his average weekly wage under the so-called "prevailing wage law," which includes certain fringe benefits in the calculation of average weekly wage. See G. L. c. 152, § 1(1), and G. L. c. 149, §§ 26 and 27. (See Dec. 653; Employee br. 2; Insurer br. 2.)

Following a § 10A conference, the judge ordered the insurer to pay § 34 benefits from May 22, 2002 to November 21, 2002, and § 35 partial incapacity benefits thereafter. The judge denied the employee's claim for application of the prevailing wage law. Both parties appealed to a hearing de novo.[1] (Employee br. 3.) Dr. Richard Alemian examined the employee pursuant to § 11A on May 19, 2003. His report and deposition testimony were admitted as evidence. Dr. Alemian diagnosed the employee with healed fractures at T8, T11 and T12, and keloid scar formation secondary to a burn on his right elbow, all causally related to his work injury. He opined that the employee was no longer disabled due to his elbow burn, but was limited to lifting up to 30-35 pounds occasionally due to his back injury, which permanently partially disabled him. (Dec. 652.) The judge found the § 11A opinion to be adequate. (Dec. 654.)

[1] The judge's statement that only the insurer appealed the conference order, (Dec. 650), is incorrect. Employee's Appeal of Conference Proceeding, dated December 11, 2002. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (reviewing board may take judicial notice of documents in the board file).

In his decision, the judge credited the employee's testimony that he continues to suffer from pain due to his work injury but, relying on Dr. Alemian's opinion and the opinions of two vocational experts,[2] did not believe him to be totally incapacitated. He found:

> Given his age, 44, his education, 12th grade in Albania, his work experience of heavy and medium work, and his facility with the English language, he is conversant but not fluent, I find that he could make only a little more than minimum wage, to perhaps $10 an hour. However, given his high average weekly wage, the minimum earning capacity that I can assign is $558.37 or $13.96 an hour.

(Dec. 654.) The judge also found that, "pursuant to case law as it stands on the date of the issuance of this decision, the employee is entitled to include his fringe benefits in his average weekly wage calculation as a worker entitled to receive the state 'prevailing wage.' " Id. The judge awarded the employee § 35 benefits beginning May 22, 2002, with an earning capacity of $558.37 per week. (Dec. 655.)

Both the employee and the insurer appeal. We address three arguments. First, the employee argues that the judge erred by assigning him an earning capacity as of May 22, 2002. The employee contends that since the judge relied upon the medical opinion of the § 11A examiner, Dr. Alemian, who didn't see the employee until a year later, on May 19, 2003, there is no evidence to support a finding that the employee was partially disabled until that date. We disagree.

First, we note that, though the insurer had paid the employee without prejudice through May 21, 2002, the parties stipulated at hearing that there was no dispute to the employee's entitlement to § 34 benefits until that date. (Tr. 4.)

[2] The insurer's vocational expert testified that the employee could perform light and medium work, including cashier, security guard, assembler, and dishwasher, as long as lifting is not involved. The employee's vocational expert testified that, while the employee's work capacity is limited because of pain, he could work as a light assembler, gas station attendant, or person stuffing fliers into newspapers. (Dec. 652-653.)

Thus, in assigning the employee an earning capacity as of May 22, 2002, the judge was merely addressing incapacity as of the date of the employee's claim.

Second, the judge here found the § 11A report and deposition testimony of Dr. Alemian "fully adequate." (Dec. 654.) Neither the employee nor the insurer challenged the judge's ruling of adequacy at hearing. Relevant to this case, neither party alleged that the impartial report was inadequate as to the "gap" period between May 22, 2002 and the impartial examination. Therefore, we need not address the question of adequacy on appeal. See Cugini v. Town of Braintree School Dep't, 17 Mass. Workers' Comp. Rep. 363, 365 (2003). Dr. Alemian's opinion, as the only medical opinion, is prima facie evidence of the employee's medical condition, and the judge is bound to accept it, Murphy v. Commissioner of the Dept. of Indus. Acc., 415 Mass. 218, 224 (1993), unless to do so would deprive a party of due process of law. O'Brien's Case, 424 Mass. 16, 24 (1996).

The employee posits, however, that Dr. Alemian's opinion addressed the employee's incapacity only as of the time of his examination, and not prior to it. Thus, the employee seems to contend that because he had received total disability benefits until May 21, 2002, and Dr. Alemian opined that at the time of his examination on May 19, 2003, the employee was partially disabled, (Ex. 3; Dep. 13), he should receive total incapacity benefits during the interim period. This argument ignores the principle that the employee has the burden of proving every element of his claim, Sponatski's Case, 220 Mass. 526 (1915), and thus the burden of moving to submit additional medical evidence to cover the gap period, if he believes the impartial report does not address extent of disability for all relevant periods, i.e., is inadequate. See Mims v. M.B.T.A., 18 Mass. Workers' Comp. Rep. 96, 99 and n.1 (2004)(where impartial opinion cannot reasonably be read to cover the prior period of claimed incapacity, employee counsel are well-advised to

request the admission of additional medical evidence).[3]

Due to his failure to move to submit additional medical evidence addressing disability during the period from May 22, 2002 to May 19, 2003, the employee has no basis for complaining that the judge should have found him totally disabled until the impartial examination. In fact, the employee arguably received more benefits than he proved he was entitled. Since the insurer has not appealed this aspect of the decision, however, we consider the issue waived, see Maliff v. Kinder-Care Learning Ctr., 4 Mass. Workers' Comp. Rep. 126, 127 (1990), and affirm the award of partial incapacity benefits.

While we summarily affirm the judge's finding that the employee is entitled to the application of the "prevailing wage" law in the calculation of his average weekly wage, we address one argument touching on this issue. The employee contends that the judge erred by not specifically finding that the wage enhancement provisions apply to the period from the date of injury until May 21, 2002, thereby increasing the employee's § 34 benefits for that period. It appears to us that the prevailing wage applies to that period of time. While the parties stipulated that the employee was entitled to § 34 benefits during that five-month period, (Tr. 4), they did not stipulate to the employee's average weekly wage, which was clearly raised by the employee. (Dec. 648.) It is reasonable to infer that the pre-injury average weekly wage determined by the judge should apply to the prior period of uncontested § 34 incapacity. Galindez v. Int'l House of Pancakes, 12 Mass. Workers' Comp. Rep. 214, 217 (1998)(judge erred in not correcting average weekly wage back to date of injury, even though parties had stipulated to a lower average weekly wage at a prior hearing). If necessary to resolve this issue, the employee, of course, may file a claim.

[3] There are many situations where the impartial medical report, read in conjunction with the employee's testimony, can support the inference that the employee's condition has not changed from the date of injury until the impartial examination. See Cugini, supra. at 366; Mims, supra at 99.

The insurer argues that the judge erred in the amount he assigned as an earning capacity. The insurer's argument seems to be that the judge should have found that the employee had an *actual* earning capacity of $558.37 (or $13.96 an hour), rather than merely assigning that earning capacity to him, in order to make the employee's § 35 benefit equal no more than 75% of his § 34 benefit, as required by G. L. c. 152, § 35.[4] The employee argues on appeal that the judge's vocational assessment would give him a $400.00 earning capacity at most. (Employee br. 7-8.) We agree that where his vocational analysis resulted in a finding that the employee could make "only a little more than minimum wage, to perhaps $10 an hour," (Dec. 654), the judge erred in finding that, "given [the employee's] high average weekly wage, the minimum earning capacity that I can assign is $558.37 or $13.96 an hour."

The fact that an employee's assigned earning capacity might yield an amount greater than the statutory cap on § 35 benefits, i.e., 75% of his § 34 benefit, is irrelevant to the earning capacity determination. The judge is first required to determine earning capacity under § 35D.[5] Even if this earning capacity would otherwise result in a higher weekly compensation rate, § 35 operates as a

---

[4] General Laws c. 152, § 35, provides, in relevant part:

> While the incapacity for work resulting from the injury is partial, during each week of incapacity the insurer shall pay the injured employee a weekly compensation equal to sixty percent of the difference between his or her average weekly wage before the injury and the weekly wage he or she is capable of earning after the injury, but not more than seventy-five percent of what such employee would receive if he or she were eligible for total incapacity benefits under section thirty-four.

[5] "Section 35D instructs the judge to use the greatest amount of four alternative methods to determine earning capacity: the actual weekly earnings of the employee; the earnings the employee is capable of earning in the job held at the time of injury, provided the job is made available to him and he is capable of performing it; the earnings the employee is capable of earning in a particular suitable job made available to him and which he is capable of performing; or the earnings the employee is capable of earning." O'Sullivan v. Certainteed Corp., 18 Mass. Workers' Comp. Rep. 16, 22 (2004.)

matter of law to cap his § 35 benefit at the 75% mark. Here, the judge performed an adequate vocational analysis, supported by the testimony of two vocational experts, and concluded that the employee "could make only a little more than minimum wage, to perhaps $10 an hour." (Dec. 654.) The judge's assignment of an earning capacity should have been based on this vocational assessment. The judge erred by assigning the employee a higher earning capacity than that resulting from his vocational analysis. Therefore, we reverse the earning capacity assignment of $558.37 a week, and apply the judge's finding of a $400.00 earning capacity per week.[6] If necessary the employee may file a claim for § 34 benefits between December 28, 2001 and May 21, 2002, to be increased to reflect the "prevailing wage" enhancement. Otherwise the decision is affirmed.

Pursuant to § 13A(6), the insurer is directed to pay employee's counsel a fee in the amount of $1,312.21.

So ordered.

_____
Martine Carroll
Administrative Law Judge

_____
William A. McCarthy
Administrative Law Judge

Filed: **September 22, 2005**

_____
Patricia A. Costigan
Administrative Law Judge

[6] We note that the judge's determination will not affect the employee's § 35 benefit at present, though it is possible that at some future point it might.